No. 76-5416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici curiae Lawyers' Committee for Civil Rights Under Law, Mexican American Legal Defense & Educational Fund, Inc., and National Association for the Advancement of Colored People respectfully seek leave to file the attached brief in order to assist the Court in resolving important issues affecting the right to recover meaningful damages in actions brought pursuant to 42 U.S.C. § 1983 to redress unconstitutional police misconduct causing death. In the attached brief, *amici* discuss several underlying questions which are critical to the

disposition of this cause but which *amici* do not believe will be addressed by the parties.

The interest of *amici* in this case grows out of their longstanding concern with the problem of devising remedies that will secure the effective enforcement of federal civil rights laws, and in particular their past and present involvement in litigation on behalf of minority citizens who have suffered injury or death at the hands of police officers.

Amici have sought consent to the filing of this brief but such consent has been refused by counsel for Respondents.

WHEREFORE, *amici* respectfully move that their brief be filed in this case.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Constitution and Statutes

Rules

Other Authorities

TABLE OF AUTHORITIES—Continued

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AS *AMICI CURIAE*

Interest of *Amici Curiae*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States, John F. Kennedy, to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, nine past Presidents of the American Bar Association, two former Solicitors General, a number of

law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has been intimately involved in litigation on behalf of minority-race persons seeking redress for unconstitutional police conduct, especially the use of excessive physical force, including deadly force. This litigation has been based principally upon 42 U.S.C. § 1983, which derives from the Ku Klux Act of 1871. The Committee's experience is that broad principles of relief are essential to the fulfillment of that statute's goals. In particular, the rules of damages applicable to § 1983 litigation must not only assure complete compensation for personal injuries resulting from the unjustified use of excessive force by police officers; the rules must also assure that, in appropriate circumstances, exemplary damages will be awardable. The realistic possibility that egregious abuses of police authority may result in substantial damage awards is necessary if such unconstitutional conduct is to be deterred.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a privately-funded civil rights organization founded in 1968. MALDEF is dedicated to ensuring through law that the civil rights of Mexican Americans are protected. Over the past nine years MALDEF has represented or assisted Mexican Americans in a variety of cases brought under 42 U.S.C. § 1983 arising from violent abuse of police authority. MALDEF therefore has a significant interest in the continuing vitality of § 1983 as a legal remedy for the deprivation of federal rights.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. 42 U.S.C. § 1983 has been central to the NAACP's litigation efforts, especially those seeking redress for personal injury and death unnecessarily inflicted upon minority citizens by police officials under color of state law.

In the experience of *amici*, the unwarranted misuse of police power, including the unjustifiable use of deadly force, disproportionately strikes down minority Americans. In the present § 1983 case, brought in Colorado state court, a Denver police officer is charged with intentionally killing a fifteen-year-old black boy without reason. Astonishingly, the courts below have effectively determined that, under recovery rules which they deemed mandated by federal law, this unconstitutional death has a compensable value of $1,500. We are confident from our experiences and observations that almost any degree of physical injury short of death would have a higher value anywhere in the country, including Colorado. If the rule announced below is affirmed by this Court, therefore, the result will be that the Nation's law enforcement officers will be given an incentive to kill during the course of employing excessive force. Such a rule is intolerable, in our view; it seriously undermines our efforts to secure complete justice for our clients; and it repudiates the basic purposes of § 1983.

Amici thus have an interest in this dispute greater than that of the actual parties. In the remainder of this brief we address issues which may not be discussed by the parties, but which we believe are essential to the just disposition of this case. That disposition, in our opinion, requires reversal of the judgment below and a remand for the trial of petitioner's § 1983 claims.

STATEMENT OF THE CASE

On February 5, 1972, respondent Hildebrant, a white Denver, Colorado police officer, intentionally shot and killed petitioner's 15-year-old black son. Petitioner instituted this action against respondent Hildebrant and respondent City and County of Denver on October 15, 1973, in the State District Court for the City and County of Denver, seeking compensatory and punitive damages for the alleged unlawful killing of her son, and raising claims under both state and federal law.[1] In their answer respondents admitted the shooting, and admitted that respondent Hildebrant was acting within the scope of his office as a Denver law enforcement officer. Respondents denied, however, that petitioner's son was killed in violation of either state or federal law; respondents asserted as affirmative defenses that the killing was privileged because decedent was a fleeing felony suspect who could not have been apprehended without the use of deadly force, that respondent Hildebrant employed deadly force in self-defense, and that he used only that amount of force reasonably necessary under the circumstances.

[1] As amended, petitioner's complaint in the state trial court, as consistently construed by both the trial court and the Colorado Supreme Court, stated three claims for relief: (1) for battery under state law; (2) for negligence under state law; (3) for violation of federal constitutional rights. *See Jones* v. *Hildebrant*, 550 P.2d 339, 341 (Colo. 1976). The state courts treated the first two claims for relief as being authorized by the state wrongful-death statute, COLO. REV. STAT. § 13-21-202 (1973); the third claim was treated as one authorized by 42 U.S.C. § 1983. However, the complaint did not expressly refer to either the state wrongful-death statute or § 1983. The federal claim also makes no reference to specific provisions of the federal Constitution, but, fairly read, it alleges violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The lower courts in this case have uniformly construed this as a Fourteenth Amendment cause of action authorized by § 1983.

The case proceeded to trial on all of petitioner's claims. At the close of proof and before the case was submitted to the jury, however, respondents moved to dismiss petioner's federal (42 U.S.C. § 1983) claim. The trial judge granted the motion on the ground that the § 1983 claim merged with the state law claims, and that no relief different from that recoverable under the state-law claims was available under § 1983. The case thus went to the jury on petitioner's state-law claims only. On the issue of damages, the jury was instructed that petitioner was limited to recovering the net pecuniary loss she sustained as a result of her son's death, with a maximum allowable recovery of $45,000 (because petitioner was not a dependent of decedent); future earnings, loss of society, exemplary damages and the like were held to be unrecoverable under state wrongful-death law. The jury resolved the issues of liability under state law in petitioner's favor but returned a verdict of only $1,500 against respondents. The trial judge denied a motion for a new trial on the issue of damages.

On petitioner's appeal, the Colorado Supreme Court addressed a number of issues, *Jones* v. *Hildebrant*, 550 P.2d 339 (Colo. 1976), only a few of which are fairly comprised within the grant of certiorari. SUPREME COURT RULES 23(1)(c), 40(d)(1). With respect to petitioner's appeal on the limitations placed on damages recoverable under the state-law claims, the Colorado Supreme Court (1) declined to discard the "net pecuniary loss" rule first established in an 1894 decision of that court, and (2) upheld the $1,500 verdict as being adequate under that rule, 550 P.2d at 341-42. Neither of these issues is presented for review by this Court, nor could they be.[2]

[2] The court implicitly rejected petitioner's claim that the "net pecuniary loss" limitation on recovery under the state's wrongful-death statute was inconsistent with the Fourteenth Amendment.

As to petitioner's federal claim that her § 1983 cause of action was distinct from the state-created wrongful death action—and that it should not therefore have been "merged" with the state action nor dismissed by the trial judge [3]—the Colorado Supreme Court considered and decided four somewhat overlapping issues. At the outset, the court considered a contention by petitioner (viewed by the court as "confusingly stated") to the effect that petitioner's "civil right to her son's life," as recognized by the state wrongful-death statute, "was denied her without due process of law through his wrongful killing." 550 P.2d at 342. On the basis of this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), the court rejected this contention, holding that "where, as here, the state allows a plaintiff to bring her [wrongful-death] suit, she is not deprived of any of her civil rights without due process of law." 550 P.2d at 343. While we confess difficulty in understanding this issue,[4] it is a

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550 P.2d at 342. This claim likewise is not pressed before this Court by the petitioner.

[3] Since petitioner's § 1983 claim was dismissed prior to submission of the case to the jury, there has been no determination that plaintiff's son was killed in contravention of the federal Constitution, as distinct from state law. The Colorado Supreme Court appears to have assumed that the facts as found by the jury also constituted a federal constitutional violation. In any event, this Court must, in the present posture of this case, make a similar assumption, as in all cases where a federal claim is dismissed prior to decision on the merits. It is sufficient to observe here that the Fourteenth Amendment expressly protects human life from wanton deprivation by the state. *See, e.g., Screws* v. *United States*, 325 U.S. 91 (1945). If petitioner prevails here, therefore, she will be entitled to a remand for trial of her § 1983 claims.

[4] Apparently petitioner's contention was: (1) that Colorado's wrongful-death statute created substantive property rights in a class of individuals bearing certain specified relationships to decedents; (2) that these rights were protected by the Fourteenth Amendment; and (3) that in a § 1983 wrongful-death action, the state "net pecuniary loss" rule could not be applied without infringing those substantive property rights in violation of the Four-

constitutional claim which need not be determined in order to reach the question presented for review by this Court, and it is not fairly comprehended within the grant of certiorari.

The next three issues decided by the Colorado Supreme Court are, however, properly embodied within the question presented for review here, for they involve interpretations of § 1983 which led the court below to conclude that § 1983 was identical in purpose and effect to the Colorado wrongful-death statute. First, the court attempted to determine the federal law of damages applicable to § 1983 wrongful-death actions brought in Colorado federal courts. Reviewing a number of lower federal court decisions which had utilized 42 U.S.C. § 1988 to "incorporate" relevant state survival and wrongful-death statutes into § 1983 actions brought in federal court, the Colorado Supreme Court concluded

> that Colorado's wrongful death remedy would be engrafted into a § 1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the § 1983 claim should be dismissed.

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teenth Amendment. Petitioner may have relied, incorrectly, upon the previous decision in *Fish* v. *Liley*, 120 Colo. 156, 208 P.2d 930 (1949) to support her assertion that the wrongful-death statute created a "property right." In the instant case, however, the Colorado Supreme Court rejected that assertion and characterized the wrongful-death statute as "remedial," 550 P.2d at 344, creating only a "right to sue" at law for a tort which, under *Paul* v. *Davis*, 423 U.S. 693 (1976), was distinguishable from a "property right." In any event, since petitioner has not pressed her attack upon the "net pecuniary loss" limitation of the state claim (*see* note 2, *supra*), this issue also does not seem to be presented for this Court's review.

> Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.

550 P.2d at 344 (footnotes omitted). Second, the court rejected petitioner's argument that there is a § 1983 wrongful-death remedy independent of state law. The court based its conclusion "on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts." *Id.* at 345 (footnote omitted). Third, the court held that "one may not sue for the deprivation of another's rights under § 1983 . . ." and that petitioner "therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action." *Id.*

Two Justices dissented on the ground that "Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death [does not] appl[y] to actions founded upon 42 U.S.C. § 1983 (1970)." *Id.* at 345-46. It is this question framed by the dissenting Justices, and the issues fairly comprised therein, that are before the Court pursuant to its grant of certiorari.

SUMMARY OF ARGUMENT

I

This case presents important questions of federal law concerning the fashioning of appropriate relief in actions brought pursuant to 42 U.S.C. § 1983 alleging that unconstitutional state action caused human death. The precise question presented for review—"what is the measure of damages" in such an action—arises (as the phrasing in the Petition for Certiorari indicates) in the con-

text of a *state* court disposition of a § 1983 claim which the Colorado courts are willing and able to entertain. However, the court below clearly understood that it was considering and deciding questions of *federal* law in determining that the measure of damages in a § 1983 wrongful-death action was the same as that in the state wrongful-death claim. There are no considerations of comity or federal-state tensions which affect the disposition of the *federal* questions presented in this case, which is in the same posture as if it had been brought in the United States District Court for the District of Colorado and federal judges below selected the Colorado "net pecuniary loss" rule as the measure of damages in a § 1983 action.

II

The court below was correct in deciding another issue implicit in the question presented for review here: whether § 1983 authorizes a cause of action to be prosecuted when constitutional wrong results in death. Although the parties may not address this issue, this Court's disposition of the major question may necessarily decide it, and *amici* therefore discuss it. As we show, the lower federal courts and the Colorado courts in the instant case have uniformly recognized a § 1983 action for wrongful death resulting from unconstitutional action, though on the basis of differing rationales. The result in these cases is clearly correct, and this Court should have no hesitation in affirming the determination of this issue by the Colorado Supreme Court in order to reach and decide the important remedial question which is the major subject of controversy in this case.

III

The court below was of the view that while petitioner was entitled to utilize the process of Colorado's wrongful-death statute in order to maintain a § 1983 action against

respondents, she was also required to accept the severe limitations on damages embodied in that statute, as judicially construed. The plain meaning of this ruling, in the context of this case, is that even if petitioner's 15-year-old son was killed in violation of the Fourteenth Amendment, such constitutional injury has a compensable value of $1,500. This ruling is untenable. If petitioner prevails on the merits of her § 1983 claim she is entitled to have the Colorado courts award a federal measure of relief commensurate with (1) prevailing notions of complete justice, and (2) the dual remedial purposes of § 1983's private-enforcement scheme: just compensation and deterrence of unconstitutional conduct on the part of state officials. As a general matter of federal law, principles of damages applicable to § 1983 cases must encompass all elements of the particular constitutional injury, and must also reflect the statute's exemplary goals. Colorado's "net pecuniary loss" rule is inconsistent with these applicable principles. Uniform federal rules of recovery in § 1983 actions are essential; there is no basis for the requirement imposed below that the damages rules embodied in the state's wrongful-death statute must be applied in federal § 1983 actions.

IV

If the Court should hold that reference to state wrongful-death and survival statutes in § 1983 actions must carry with it the state-created limitations on damages, then this Court should reject the use of state law in its entirety and create a federal common law of wrongful death applicable to actions under the Act, as the Court has done in other important areas of federal jurisprudence.

ARGUMENT

I. The Colorado Courts Properly Entertained This § 1983 Suit, Though They Were Required To Apply Federal Law In Determining Its Outcome.

This case presents an opportunity for the Court to decide a heretofore unresolved question: whether state courts may entertain actions brought under 42 U.S.C. § 1983. *See Aldinger* v. *Howard*, 96 S. Ct. 2413, 2430 n. 17 (1976) (dissenting opinion). *Amici* think the answer is that they may. The heart of this case is 42 U.S.C. § 1983 which, together with its jurisdictional counterpart, 28 U.S.C. § 1343(3), derives from § 1 of the Ku Klux Act of 1871.[5] The overriding purpose of that en-

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[5] As originally passed, § 1 of the 1871 Act, 17 Stat. 13, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

The cause-of-action and jurisdictional parts of § 1 of the Ku Klux Act are now separately codified, the former being 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, sub-

actment was to provide a federal forum for the enforcement of the then-recent federal rights conferred by the Fourteenth Amendment (1868). *Monroe* v. *Pape*, 365 U.S. 167 (1961). The legislative history of the Ku Klux Act reveals that Congress, rather than seeking to utilize the state courts as the primary enforcers of the Fourteenth Amendment, was displeased with those courts because of their past failures.[6] Some state courts have refused to entertain § 1983 actions precisely because of that perceived congressional hostility.[7] But the constitutional correctness of those decisions is not at issue here,[8]

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jects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdictional provision is now 28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

The evolution process is informatively traced in *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974).

[6] *See generally Monroe* v. *Pape*, *supra*, 365 U.S. at 174-80. The mood of Congress and its attitude toward state courts was accurately summed up by Representative Voorhees, an opponent of the Act, including its provisions conferring federal-court jurisdiction: "This is to be done upon the assumption that the courts of the southern States fail and refuse to do their duty in the punishment of offenders against the law." CONG. GLOBE, 42d Cong., 1st Sess., App. 179.

[7] *See, e.g., Chamberlain* v. *Brown*, 442 S.W.2d 248 (Tenn. 1969).

[8] Section 1983, of course, is in principal function a federal-court jurisdictional vehicle for civil actions arising under the

for the Colorado courts have not expressed unfriendliness toward petitioner's § 1983 claims. Indeed, the Colorado Supreme Court's opinion in this case appears unqualifiedly receptive to petitioner's § 1983 arguments, and the court made a creditable attempt, albeit an erroneous one in our view, to interpret and apply federal law.[9]

With this background, the only state court/federal law question that could remain is whether, contrary to the Colorado Supreme Court's assumption, state courts

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Fourteenth Amendment (or, to be more precise, under "the Constitution and laws"). Section 1983 aside, it is difficult to perceive, given the Supremacy Clause (indeed, given the plain language of the Fourteenth Amendment itself), how a state court of general jurisdiction could, as in cases such as the one cited in note 7, *supra*, refuse to receive an action to vindicate Fourteenth Amendment rights. Any contention that such state power exists would seem to have "been resolved by war" to the contrary. *Testa* v. *Katt*, *supra*, 330 U.S. 386, 390 (1947). But, as we say, that issue is not implicated here.

[9] This case does not involve any of the knotty conflicts between state courts and federal law which have arisen from time to time over the years. Accordingly, we take a moment to identify what is not at issue here. In general, this case presents none of the more difficult problems flowing from Mr. Justice Bradley's benchmark post-Civil War decision in *Claflin* v. *Houseman*, 93 U.S. 130 (1876), holding that federally-created rights could be vindicated in state courts with competent jurisdiction. More specifically, this case is not one in which the state court, by virtue of some uniformly-applied procedural rule pertaining to access to it, has refused to entertain a federal cause of action. *Cf. Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950) (Frankfurther, J.); *Douglas* v. *New York, N.H. & H.R.R.*, 279 U.S. 377 (1929) (Holmes, J.). Nor is this case one in which Congress has created a cause of action and conferred concurrent enforcement jurisdiction on the federal and state courts, but state-court jurisdiction is refused on grounds which discriminate against the cause of action solely because of its federal source. *Cf. Testa* v. *Katt*, 330 U.S. 386 (1947) (Black, J.); *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) (Brandeis, J.); *Second Employers' Liability Cases* (*Mondou* v. *New York, N.H. & H.R.R.*), 223 U.S. 1 (1912). And, manifestly, this case is not one in which Congress has attempted to force upon the state courts the duty to enforce a federal law. *Cf. Brown* v. *Gerdes*, 321 U.S. 178, 191 (1944) (Frankfurter, J., concurring).

lack authority to adjudicate § 1983 cases. In other words, are § 1983-Fourteenth Amendment causes of action matters, either expressly or by necessary implication, within the exclusive province of federal judicial power? Last Term three members of this Court expressed the view "that § 1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts." *Aldinger* v. *Howard*, *supra*, 96 S. Ct. at 2430 n. 17 (1976) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). That view, in our judgment, is unassailable in the light of established precedent. Without a case in this Court squarely on point, it would be difficult to find a more closely analogous decision than that in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962).

Charles Dowd involved a labor-contract suit initiated in state court. By § 301(a) of the Labor Management Relations Act of 1947, however, Congress had provided that such suits "may be brought in any district court of the United States. . . ." *See id.* at 502. Section 301 was produced by circumstances not unlike those that gave birth to § 1983—namely the inadequacy or unavailability of state-court remedies:

> A principal motive behind the creation of federal jurisdiction in this field was the belief that the courts of many States could provide only imperfect relief because of rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations.

Id. at 510. Moreover, in *Textile Workers Union* v. *Lincoln Mills*, 363 U.S. 448 (1957), this Court had held that § 301 cases brought in federal courts were to be governed by federal rather than state law, a proposition that inescapably obtains in § 1983-Fourteenth Amendment cases. The contention was accordingly made in *Charles Dowd* that even though § 301 did not expressly provide for exclusive federal-court jurisdiction, federal exclusivity must necessarily be implied from the *Lincoln Mills*-§ 301 scheme as it had been implied in other cases.[10] The Court unanimously rejected the argument in an opinion authored by Mr. Justice Stewart. Upon examination of the legislative history, the Court found that "the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." *Id.* at 511. Congressional purpose was to submit § 301 problems " 'to the usual processes of the law.' " *Id.* at 513. This legislative history coupled with Justice Bradley's *Claflin* v. *Houseman*[11] test—that the state courts have concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case" (93 U.S. at 136)—led the Court in *Charles Dowd* to the inevitable conclusion that the state courts enjoyed jurisdiction concurrent with that of the federal courts in § 301 cases.

A similar analysis leads to the same conclusion with respect to the authority of the state courts to hear § 1983 cases. We have found nothing in the legislative debates manifesting a congressional desire to deprive the state courts of jurisdiction in Fourteenth Amendment cases. While it is true that Congress was displeased with the performance of state courts in this regard (*see* note 6, *supra*), it is also clear that Congress understood that Fourteenth Amendment rights could be vindicated in the state courts, as rights secured by the Contracts Clause, for example, had been historically, with ultimate federal

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[10] *See, e.g., San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Garner* v. *Teamsters, C. & H. Local Union*, 346 U.S. 485 (1953); *Brown* v. *Gerdes*, 321 U.S. 178 (1944).

[11] *See* note 9, *supra*.

protection provided in the form of review by this Court under § 25 of the Judiciary Act of 1789.[12] Yet, there is no indication whatsoever that Congress intended § 1 of the Ku Klux Act to deprive the state courts of power to decide Fourteenth Amendment cases. It simply chose the federal judiciary, which it viewed as being less susceptible to the pressures of popular passions than the state court systems, as the primary forum for the adjudication of individual federal rights[13]—primary but, at the litigant's option, not exclusive.[14]

The language of § 1983's jurisdictional grant, 28 U.S.C. § 1343(3), also fails to support an argument for exclusivity. There is no difference between the language of § 301 considered in *Charles Dowd* and that of § 1343 sufficient to require a different conclusion. The principal difference is that § 301 spoke in terms of "may" (labor-contract cases "*may* be brought in any district court of the United States"), while § 1343's preamble speaks in terms of "shall" ("[t]he district courts *shall* have original jurisdiction" of the enumerated civil actions, including those authorized by § 1983).[15] But the "shall" mandate simply obliges federal courts to receive § 1983 cases; it does not preclude the state courts from also

[12] *See Monroe* v. *Pape*, *supra*, 365 U.S. at 194-98 (Harlan, J., concurring).

[13] *See, e.g., Steffel* v. *Thompson*, 415 U.S. 452 (1974); *District of Columbia* v. *Carter*, 409 U.S. 418 (1973); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972); *Mitchum* v. *Foster*, 408 U.S. 225 (1972); *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

[14] When the Congress of these times desired to confer exclusive federal jurisdiction, it knew how to do it expressly. *See* note 36, *infra*, for example.

[15] The original jurisdictional language, as it appeared in § 1 of the Ku Klux Act (*see* note 5, *supra*) authorized an appropriate "action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States. . . ."

entertaining them. That is the teaching, without exception, of the *Claflin* v. *Houseman* line of cases.

State courts are thus free to contribute to § 1983-Fourteenth Amendment jurisprudence. Of course, in the contribution process it is federal law rather than state law which they must expound. The Court made that clear enough when later in the same Term that produced *Charles Dowd* it rejected a state-court determination that state courts could apply state law in § 301 cases. *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). That conflict, however, is not presented by the decision below in this case, as the Colorado Supreme Court made a straightforward effort to determine and apply federal law. The case is thus in no different posture for decision-making purposes than it would be had it arrived here from a lower federal court. The Court's task in this case, as in the numerous previous state-court cases requiring the application of federal law by this Court,[16] as well as the many federal cases in which the Court has been required to develop federal law,[17] is to decide what federal law is or ought to be and apply it to the case. That such cases may occasionally arise in the state courts is an asset rather than a liability; it is good constitutional law and, consequently, good federalism. As Mr. Justice Stewart put it in *Charles Dowd* (368 U.S. at 514) (footnote omitted):

> It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of

[16] *See, e.g., Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *Local 174* v. *Lucas Flour Co.*, *supra*; *Farmers Educ. Cooperative Union* v. *WDAY*, 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942); and other cases discussed in Argument IV, *infra*.

[17] *See, e.g.*, cases and authorities discussed in Argument IV, *infra*.

federal common law of which *Lincoln Mills* spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.

II. Civil Actions May Be Maintained Under 42 U.S.C. § 1983 By Persons, Such As Petitioner Here, Who Seek To Redress Unconstitutional State Action Resulting In Human Death.

Although this Court has never addressed the question,[18] the lower federal courts are in unanimous agreement that death does not abate a pending § 1983 cause of action nor prevent the bringing of such an action for unconstitutional conduct which causes death.[19] These courts

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[18] In *Moor* v. *County of Alameda*, 411 U.S. 693, 702 n.14 (1973), the Court noted, without approval or disapproval, that the lower federal courts had applied "state survivorship statutes" in § 1983 cases. In *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the Court considered other problems in a § 1983 wrongful-death case without alluding to any of the questions present here.

[19] At common law, death gave rise to no cause of action and terminated all those for personal torts. As described by this Court in *Moragne* v. *States Marine Lines, Inc.*, 393 U.S. 375 (1970), the reason can be traced to the felony-merger doctrine, under which the penalty for committing a felony included the forfeiture to the Crown of all property owned by the wrongdoer. The harshness of the doctrine has been substantially ameliorated by the passage of statutes both in England and in this country. While these statutes vary widely in their terms and scope, most legislative schemes create two separate and distinct causes of action. The first, termed "survival" statutes, generally permits recovery by the decedent's executor of damages which accrued from the injury prior to the death of the decedent. *See Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 575 n.2 (1974). The second, generally described as "wrongful-death" statutes, permits the heirs to bring suit subsequent to the decedent's death for the loss to them. *See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS §§ 24.1-24.3 (1956), C. MCCORMICK HANDBOOK ON DAMAGES § 12 (1935). Colorado has enacted both

have uniformly considered themselves obligated by established principles to fashion a federal law of wrongful death and survival in § 1983 cases.[20] To be sure, these courts also frequently utilize 42 U.S.C. § 1988 (which we discuss below) as a vehicle by which to utilize state wrongful-death and survival provisions. But when relevant state law is absent or found wanting, the courts proceed to shape a suitable federal rule.[21] *Amici* believe

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types of statutes; the wrongful-death action is created by COLO. REV. STAT. § 13-21-202 and the survival statute is § 13-20-101. An action under the survival statute does not preclude an action for wrongful death. *Id.*, § 13-20-101(1). The former must be brought by the executor of the decedent's estate, but the latter may be brought by certain designed survivors. Some states permit survival actions to be brought by the executor of the estate for damages even where death is instantaneous. Colorado apparently is not one of these. *See Publix Cab Company* v. *Colorado National Bank of Denver*, 139 Colo. 205, 338 P.2d 702, 706 (1959). The difference between wrongful-death and survival statutes is discussed in W. PROSSER, LAW OF TORTS, §§ 126, 127 (4th ed. 1971); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965).

Since petitioner's decedent died instantly, this suit was commenced under the Wrongful Death Statute and not the survival statute. Petitioner sued individually as the mother of the decedent and not as the administratrix of her son's estate. Thus, as the complaint made clear, the suit, insofar as it states a claim under 42 U.S.C. § 1983, asserts a cause of action on the basis of the alleged unlawful killing of petitioner's son.

[20] *See, e.g., Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Mattis* v. *Schnarr*, 502 F.2d 588, 593 (8th Cir. 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pritchard* v. *Smith*, 289 F.2d 153 (8th Cir. 1961); *Smith* v. *Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *James* v. *Murphy*, 392 F. Supp. 641 (M.D. Ala. 1975); *Evain* v. *Conlisk*, 364 F. Supp. 1188 (N.D. Ill. 1973), *aff'd*, 498 F.2d 1403 (7th Cir. 1974); *Perkins* v. *Salafia*, 338 F. Supp. 1325 (D. Conn. 1972); *Salazar* v. *Dowd*, 256 F. Supp. 220 (D. Colo. 1966); *Cinnamon* v. *Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963); *Davis* v. *Johnson*, 138 F. Supp. 572 (N.D. Ill. 1955).

[21] *See, e.g., Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977) (Wisdom, J.).

that this result is wholly sustainable as a rightful part of the business of judging in a federal system, quite apart from § 1988 or state law.

A. *Section 1983 Creates A Constitutional Cause of Action Wholly Apart From State Tort Law.*

Section 1983-Fourteenth Amendment actions at law are inherently distinct from state tort actions and, for that matter, any other type of legal action that does not concern personal rights guaranteed by the Constitution. We are confirmed in this view by all of this Court's § 1983 decisions from *Monroe* v. *Pape*, 365 U.S. 194 (1961) through *Paul* v. *Davis*, 424 U.S. 693 (1976). Those decisions instruct that the facts which make out a § 1983 cause of action may coincidentally constitute a state-law tort or some other violation of state law, but that conduct unlawful under state law does not *ipso facto* establish the components of a § 1983 case. The failure to perceive this critical distinction is at the bottom of the Colorado Supreme Court's erroneous conclusion that petitioner's § 1983 claim merged with her state-law claims.

The inherently unique nature of a § 1983 case derives not solely from the "under color of law" element, *see Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), although this is the ingredient that in the first instance distinguishes § 1983 from common-law tort doctrine. The more important difference, in cases such as this, is the fact that § 1983 is a vehicle for the vindication of individual constitutional rights guaranteed by the Fourteenth Amendment.[22] As Mr. Justice Harlan explained in *Monroe* v. *Pape*, *supra*, 365 U.S. at 196 (concurring opinion), "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." It is because constitutional rights are involved that the interests protected by § 1983 transcend the values with which the general common law is concerned. The district court's decision in *Shaw* v. *Garrison*, 391 F.Supp. 1353 (E.D. La. 1975), *aff'd*, 545 F.2d 980 (5th Cir. 1977), illustrates the distinction. There Judge Heebe refused to allow a pending § 1983 action to abate because of the death of the plaintiff, although under state law governing actions for libel, slander or malicious prosecution the death of the plaintiff would have abated the action. The inherent difference between § 1983-Fourteenth Amendment actions and state-tort actions was critical to Judge Heebe's decision (391 F.Supp. at 1364 n.17):

> The fact of the matter is that this is not a state action for libel, slander or malicious prosecution, but a federal action for violation of plaintiff's civil rights. We have already determined that the purposes underlying this statute require that the action not abate, if there is some proper mechanism for survival. The fact that some states may have a different policy for a cause of action based on the same facts yet differently characterized should not be binding on a federal court construing civil rights actions.

It is not only § 1983's concern with constitutional rights, however, that makes it intrinsically unique. For there is the added factor of the statute's great remedial design. It is thus because of the overriding *constitutional* remedial purpose of § 1983's private enforcement scheme —designed both to compensate for and to deter constitutional injury—that causes of action thereunder require

[22] This case does not involve the "and laws" portion of § 1983.

a special place in the litigation hierarchy.[23] It is, in

[23] As stated in Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX.L.REV. 1015, 1026 (1967):

> [T]he basic policy behind tort law is compensation for physical harm to an individual's person or property by shifting losses from the one injured to the one perpetrating the injury, while the underlying policy of the civil rights statutes is quite different. The legislative intent behind these statutes is not entirely certain since other provisions of the Act of 1871 received far more attention in congressional debate than did those that eventually became sections 1983, 1985, and 1986. One purpose of the Act apparently was to provide a federal forum for rights that the disorganized Southern state governments were not protecting adequately. It seems clear, however, from the statements of a few legislators, the title of the Act itself, and the circumstances surrounding its passage that the Act's primary purpose was to enforce the fourteenth amendment by providing a positive, punitive civil remedy for acts of racial discrimination. Thus an award of damages would depend not on the common-law test of whether a plaintiff had suffered a measurable physical or economic injury, but on whether the defendant's conduct came within the scope of actions that the statutes were intended to penalize. While traditional tort law damages rules may be appropriate to accomplish some of the civil rights statutes' purposes, the tort-law rules do no [*sic*] allow full realization of those purposes because of their emphasis upon loss-shifting rather than upon punishment and deterrence. [footnotes omitted]

Since § 1983 and common-law tort concepts protect different interests, and concern different legal relationships, a plaintiff injured in both respects may maintain separate suits in both state and federal courts, even though both wrongs arise out of the same occurrence. Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DENVER L.J. 480, 481, 483 (1966). Or, both the state and federal claims may be combined in a single suit in state court, as here; or, with certain limitations, both claims may be brought in one suit in federal court, with the state claim cognizable under the doctrine of pendent jurisdiction. *Aldinger* v. *Howard*, 96 S. Ct. 2413 (1976). This does not mean, of course, that double recovery will be permitted for the same elements of injury. *See Stringer* v. *Dilger*, 313 F.2d 536, 541-42 (10th Cir. 1963); *Rue* v. *Snyder*, 249 F. Supp. 740, 743 (E.D. Tenn. 1966); *see generally* Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1029-30 (1967). *Cf. Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974). Thus, in the instant case, the jury (had petitioner's § 1983 claims

other words, the superior quality of these "federally protected rights" that calls into play the intense judicial scrutiny not normally associated with the legal relationships governed by the general common law as developed by the states. *See Bell* v. *Hood*, 327 U.S. 678, 684 (1946). That the statute is preoccupied with remedy is made plain from the congressional debates on both the Fourteenth Amendment and its principal enforcement mechanism, the Ku Klux Act, from which § 1983 derives. It was repeatedly asserted that equal rights and the privileges and immunities of citizens were being denied by the states, "and that without remedy." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (Remarks of Rep. Bingham with reference to § 1 of the proposed Fourteenth Amendment). And the opponents contended that the majority of Congress were willing "to overturn the whole Constitution to get at a remedy for these people." *Id.* at 499 (Sen. Cowan). The Ku Klux Act which Congress debated in the Spring of 1871 did not "overturn the whole Constitution," but there can be no doubt that its central thesis was to provide a supervening federal remedy for denial of the fundamental rights which the Fourteenth Amendment was designed to secure as against the states. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess., App. 85 (Rep. Bingham, the author of § 1 of the Fourteenth Amendment).

With respect to this central remedial theme, and importantly for this case, it is clear that Congress did not intend to place death-dealing constitutional injury beyond the reach of the statute. Quite simply, "it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to

been submitted to the jury) could have been instructed that if the defendants were found liable under both the state and federal claims, the verdict under § 1983 could not reflect the "net pecuniary loss" damages recoverable under the state causes of action.

withdraw the protection of civil rights statutes against the peril of death." *Brazier* v. *Cherry*, *supra*, 293 F.2d at 404.[24] Indeed, President Grant's message to Congress, which inspired the Ku Klux Act, was predicated upon "[a] condition of affairs [that] now exists in some States of the Union rendering *life* and property insecure . . . ." CONG. GLOBE, 42d Cong., 1st Sess. 244 (emphasis added); *see Monroe* v. *Pape*, *supra*, 365 U.S. at 172. And hardly a page of the debates passes without at least one reference to murder, lynchings and other modes of killing. It was the purpose of the Ku Klux Act to provide federal protection for "life, person and property," CONG. GLOBE, 42d Cong., 1st Sess. 321, 322 (Rep. Stoughton); it was an effort to attain "that twilight civilization in which every man's house is defended against murder and arson. . . ." *Id.* at 370 (Rep. Monroe). The debates are replete with such references. *See also*, *e.g.*, *id.* at 374 (Rep. Lowe), 428 (Rep. Beatty), quoted in *Monroe* v. *Pape*, *supra*, 365 U.S. at 175.

On the other hand, there is nothing in the debates to support a contention that § 1 of the Act (now § 1983) was intended to limit the authorized civil action by the "person injured" to those circumstances where death does not occur.[25] The only contrary argument we are aware

[24] The *Brazier* court went on to point out that "[t]he policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which could cripple." 293 F.2d at 404. As the court observed in *Davis* v. *Johnson*, 138 F. Supp. 572, 574 (N.D. Ill. 1955), a contrary holding "would encourage officers not to stop after they had injured but to be certain to kill." *See also* W. PROSSER, LAW OF TORTS § 127 at p. 902 (4th ed. 1971).

[25] Some courts, in fact, have held that the decedent's executor is a "person injured" within the contemplation of § 1983. *See*, *e.g.*, *Davis* v. *Johnson*, 138 F. Supp. 572 (N.D. Ill. 1955); *cf. Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

of is the one, consistently rejected,[26] contending that by expressly providing for wrongful-death actions in § 6 of the Ku Klux Act (now 42 U.S.C. § 1986),[27] Congress implicitly evidenced its desire to deny wrongful-death

[26] *See*, *e.g.*, *Hall* v. *Wooten*, *supra*, 506 F.2d at 568-69 n.3; *Brazier* v. *Cherry*, *supra*, 293 F.2d at 404.

[27] Section 6 of the Ku Klux Act, 17 Stat. 13, originally provided as follows:

> That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action: *Provided* That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.

As codified in 42 U.S.C. § 1986, the wrongful-death provision of the statute reads:

> and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

The "second section of this act" referred to in the original § 6 is now 42 U.S.C. § 1985, insofar as it authorizes civil actions against those affirmatively engaged in conspiracies to violate civil rights. *See generally Griffin* v. *Breckenridge*, 402 U.S. 88 (1971).

actions under § 1.[28] This is more than the process of

[28] As we point out in the text following this note, § 1 of the Act was not the cause of most of the controversy during the Ku Klux debates. Hence, it is very tenuous to draw inferences about § 1 from what happened with other parts of the bill, especially § 6. The Act originated in the House as H.R. 320, where it passed and was sent to the Senate by a vote of 118 to 91. CONG. GLOBE, 42d Cong., 1st Sess. 522. During the course of the Senate debates, Senator Sherman introduced an amendment which would have imposed civil liability for personal injuries and property damages resulting from the conduct of "any persons riotously and tumultuously assembled together" upon all of "the inhabitants of the county, city or parish" wherein such injury or damage occurred. *Id.* at 663. The proposed Sherman amendment also provided that such "riot damages" would be payable "to the person or persons damnified by such offense if living, or to his widow or legal representative if dead." *Id.* This was the first time a wrongful-death provision expressly appeared in the Ku Klux Act or any of its proposed amendments, yet there is no explanation for it. Although the Sherman amendment was adopted in the Senate (by a vote of 39 to 25) without debate (*id.* at 705), and was thus added to the Senate version of the Act, it ran into a storm of opposition in the House, as outlined in *Monroe* v. *Pape*, *supra*, 365 U.S. at 188-90. The House refused to concur in the Sherman amendment, by a vote of 132-45, and the bill was referred to House-Senate conference. CONG. GLOBE, *supra*, at pp. 725, 728. A modified version of the Sherman amendment was worked out in conference and sent to both the House and Senate. This revised version (*see id.* at 749) provided that the actual wrongdoers must also be joined in an action authorized by the amendment; it prevented, in Representative Shellabarger's words, "a claimant entitled to recover from resorting to property of individuals at all and confin[ed] his right of recovery to the county or city in which the mischief was done," *id.* at 751; it provided that the city or county would be liable only to the extent a judgment could not be satisfied against the actual wrongdoers; and it continued the wrongful-death authorization from the first version. The conference report containing this revised version of the Sherman amendment again passed the Senate (by a vote of 32-16, *id.* at 779), but also again failed in the House (106 to 74). *Id.* at 800-01. A new conference was convened, and it was at this second conference that § 6 of the Act was first proposed (*see id.* at 804). The second conference report containing § 6 (now 42 U.S.C. § 1986, *see* note 27, *supra*) ultimately passed both the House (97 to 74) (*id.* at 808) and the Senate (36-13). *Id.* at 831. Relevant to the present discussion, the § 6 compromise also contained a wrongful-death provision, though it was altered from the earlier Sherman proposals to include a one-year

negative implication will bear—for several reasons. First, it is indeed "odd to draw restrictive inferences from a statute whose purpose was to extend recovery for wrongful death." *The Tungus* v. *Skovgaard*, 358 U.S. 588, 608 (1959) (Brennan, J., dissenting). Second, the negative-implication argument overlooks the facts that § 1 of the Ku Klux Act was not the primary focus of controversy (*see Adickes* v. *S. H. Kress & Co.*, *supra*, 398 U.S. at 164-65; *Monroe* v. *Pape*, *supra*, 365 U.S. at 364-65), and that the political bartering process extant in 1871 was not conducive to "achieving legislative patterns of analytically satisfying symmetry." *Id.* at 248 (Frankfurter, J., dissenting). Third, the argument neglects the importance of the fact that § 6 was negotiated into the Act after § 1 had passed both houses of Congress by safe margins (*see* note 28, *supra*). And, finally, this Court in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 393-402 (1970), unanimously rejected a similar argument based on considerably stronger historical evidence.

statute of limitations and a $5,000 ceiling on recoverable damages. The debates shed virtually no light on why § 6 specifically authorized wrongful-death actions but the other sections did not. The only discussion of the wrongful-death provision appears in the remarks of Representative Shellabarger, where he offers his view that the wrongful-death provision in § 6 will "operate back upon the second section [now 42 U.S.C. § 1985, *see* note 27, *supra*]," whose failure to contain such a provision was a "defect" in that section. *Id.* at 805. At most, this rather sparse history, coming from one among many who debated the Act, is inconclusive. Just why the Sherman proposals, which form § 6's background, contained a wrongful-death authorization is obscure; although it seems plausible that these rather startling propositions called for special consideration because they created causes of action, in the view of many of the opponents, theretofore unheard of in the law. *Cf. Baker* v. *F. & F. Investment Co.*, 420 F.2d 1191, 1195 (7th Cir.), *cert. denied sub nom. Universal Builders Inc.* v. *Clark*, 400 U.S. 821 (1970). But whatever the explanation, § 1 had already passed beyond any point of controversy, and there is simply no basis for drawing inferences about § 1 from what happened in connection with the hotly contested proposals which became § 2 and § 6.

Thus, whatever the reason for Congress' failure to expressly provide for § 1983 wrongful-death actions in 1871, it is simply impossible to infer that they silently intended to deny for all time the availability of such suits. Many of the men who comprised the Congress during these days were notably competent lawyers,[29] and it is highly unlikely that they did not understand the full ramifications of their grant of an "action at law." [30] The debates reveal that they were students of the common law; that they were knowledgeable about how it had developed and, presumably, how it would continue to develop. When they chose, as they clearly did, to entrust the vindication of Fourteenth Amendment rights to the federal judiciary with "all the power of its courts," CONG. GLOBE, 42d Cong., 1st Sess. 578 (Sen. Trumbull), 609 (Sen. Pool), they therefore most assuredly knew what they were doing.

Regardless of their understanding or assumptions about the availability of wrongful-death actions in 1871,[31]

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[29] *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 366-67 & n.22 (1959).

[30] In § 3 of the Enforcement Act of May 31, 1870, 16 Stat. 140, the Congress authorized "an action on the case," revealing its understanding of torts not committed by force. *See* BLACK'S LAW DICTIONARY 51 (4th ed. 1957). And in § 15 of the Force Act of February 28, 1871, 16 Stat. 433, for another comparative example, Congress referred to "all cases in law or equity" and provided for a "suit for damages" for injury to person or property.

[31] The common law of England adopted by the States provided for the survival of certain actions, *see Moore* v. *Backus*, 78 F.2d 571, 573-75 (7th Cir. 1935) and state wrongful-death statutes were not uncommon in those days, *see Mobile Ins. Co.* v. *Brame*, 95 U.S. 754 (1878). The common law rule that death gives rise to no cause of action is *not* simply an aspect of the rule that personal actions die with the person. It is of later vintage and its origin has been described as a "judicial accident." Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND.L.REV. 605, 609 (1960). Lord Ellenborough's declaration in *Baker* v. *Bolton*, 1 Camp, 493, 170 Eng. Rep. 1033 (1808) came in a *nisi prius* case of little moment

without benefit of any reasoning or supporting authority. This fiat may have reflected confusion over the effect of the maxim that personal actions die with the person or from unwarranted assumptions regarding the felony-merger doctrine. *Id.* at 614-615. It was not generally followed either here or in England.

The first case in this country denying a cause of action for death was in 1848. Malone, *The Genesis of Wrongful Death*, 17 STAN.L.REV. 1043, 1066 (1965). American colonial courts commonly provided compensation to bereaved families in cases of negligent death. *Id.* at 1062-66. The 1848 decision of the Massachusetts Supreme Court in *Carey* v. *Berkshire Railroad*, 55 Mass. (1 Cush.) 475, 48 Am. Dec. 616 (1848), applying the rule of *Baker* v. *Bolton* without explanation, was followed by acceptance of the general principle in both American and English courts. *Id.* at 1068. It has been suggested that one reason the Massachusetts Court took the position it did was that the Massachusetts General Assembly had "preempted the field" of death claims by punishing, under the criminal law, certain activities resulting in deaths. *Id.* at 1069-70. Whatever the reason, other jurisdictions followed suit and throughout the latter part of the nineteenth century, courts regularly denied death actions brought on common-law principles. *Id.* at 1071. Most of these cases arose in the context of litigants who did not qualify under the Death Acts which had long existed in some states for specialized situations and which proliferated after Lord Campbell's Act was enacted by Parliament in 1846.

Even before the adoption of Lord Campbell's Act, several states had passed legislation in the nature of survival actions for certain types of injuries—including death resulting from assault and battery. Malone, *American Fatal Accidents Statutes—Part I: The Legislative Birth Pains*, 1965 DUKE L.J. 673. It was, however, the emergence of the steam railway in the middle nineteenth century which sparked the passage of death legislation throughout the country. From 1840 to 1887, 16 states made special provision for death resulting from railroad operations. *Id.* at 678. The first of these was Massachusetts in 1840. The act was penal in nature, a characteristic which still describes that state's law. While all laws dealt with the terrible toll taken by steamboats and locomotives as a separate category, some states sought from the beginning to encompass all types of situations resulting in death. Originally, Colorado counted itself among this group. *Id.* at 682. In 1872 Colorado enacted a general death statute similar to Lord Campbell's Act. In 1877, it inexplicably abandoned this approach and enacted a new statute patterned after Missouri's statute. Missouri, which became the prototype for several states, was of the "dual coverage" type, treating carriers differently from other defendants in death cases. Colorado still has this form of Death Act. *Id.* at 691. COLO. REV. STAT. § 13-21-201, providing a wrongful death action for in-

therefore, these Congressmen would not have thought that the "action at law" (or, for that matter, the "suit in equity, or other proper proceeding for redress") they were authorizing was a static concept. Representative Shellabarger introduced the bill (H.R. 320) which became the Ku Klux Act by emphasizing that it was "in aid of the preservation of human liberty and human rights," and that it was to be given "the largest latitude consistent with the words employed as are given statutes and constitutional provisions which are intended to protect and defend and give remedies for their wrongs."

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juries sustained by any "locomotive, car or train of cars", is still a penal action in the Massachusetts mold, *Clint* v. *Stolworthy*, 144 Colo. 597, 357 P.2d 649 (1960), while § 13-21-202, providing a general wrongful death cause of action, is remedial. *Jones* v. *Hildebrant*, 550 P.2d at 344; *Clint* v. *Stolworthy*, *supra*.

Thus, while not all-encompassing, many states had Death Acts on the books prior to 1871 and many of these provided for survival of claims where the injury to the decedent arose out of an assault and battery. The Reconstruction Congress which drafted the Ku Klux Act of 1871 would have had reason to believe that the legislatures of the several states were aware of the harshness of the common law rule that death gave rise to no cause of action and, largely because of the alarming rate of deaths attributable to the steam engine, were doing something about it. This Court, under the general-common law reign of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1 (1842), had not yet settled the issue of the availability of wrongful-death actions in the absence of statutory authorization. In 1878, seven years after the enactment of § 1983, this Court held for the first time that death does not give rise to a cause of action. *Mobile Insurance Company* v. *Brame*, 95 U.S. 754 (1878). And it was not until 1880 that the Court held that federal courts had jurisdiction in diversity cases of suits brought under state wrongful death acts. *Dennick* v. *Central Railway Company of New Jersey*, 103 U.S. 11 (1880). In subsequent cases the Court held that, when federal courts considered claims for wrongful death, their incorporation of state wrongful death acts included any state-imposed limitations on liability. *See, e.g., Atchison, Topeka & Santa Fe Railway Company* v. *Sowers*, 213 U.S. 55, 66-67 (1909). This was a sensible rule in the context of diversity jurisdiction where no federal cause of action such as that created by § 1983 was involved. Obviously, different considerations govern here.

CONG. GLOBE, 42d Cong., 1st Sess., App. 68. There is no reason why he should not be taken at his word.

B. *In §1983 Death Cases The Courts Are Authorized, Both By General Principles Of Federal Remedial Law And By 42 U.S.C. § 1988, To Utilize State Wrongful-Death Statutes.*

It has been a common practice in this Court, in the lower federal courts, and in the state courts, when confronted with problems arising in federal subject-matter litigation which Congress has not specifically addressed, to resort to state law for the appropriate solution. As the Court stated in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943): "In our choice of the applicable federal rule we have occasionally selected state law." In some cases this is justified on the assumption "that Congress has consented to application of state law . . . . [a]nd in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947). But it is repeatedly insisted that "the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the [federal] legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling." *Id.*

The circumstances in which state law is looked to in federal causes of action are manifold. Of particular relevance to this case are the situations where death presents a potential barrier to continuation or maintenance of a suit involving federal rights. For example, in the context of antitrust litigation,[32] FELA cases,[33] and the

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[32] *See, e.g., Rogers* v. *Douglas Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957).

[33] *See, e.g., Dellaripa* v. *New York, N.H. & H.R.R.*, 257 F.2d 733 (2d Cir. 1958).

exercise of admiralty and maritime jurisdiction,[34] the courts have looked to state survival and wrongful-death mechanisms, as a matter of federal law, and have utilized state law only when adequate to vindicate the federal interests involved. This practice has been so pervasive that it must be deemed to be a part of the fabric of federal law.

The practice just discussed has been specifically authorized by Congress in connection with both civil and criminal litigation under the Reconstruction-era civil rights acts. The legislative authorization in question is now codified in 42 U.S.C. § 1988.[35] It derives from § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27.[36] Section

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[34] *See, e.g., Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342 (1936).

[35] 42 U.S.C. § 1988 provides in full:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Although § 1988 is by its terms directed to the federal courts, this Court has held that it has equal applicability to civil rights cases arising in the state courts. *Sullivan* v. *Little Hunting Park*, 396 U.S. 259 (1969).

[36] The original version of § 3 commenced by providing for federal jurisdiction "exclusively of the courts of the several states" with respect to criminal cases arising under the provisions of the 1866 Act, and by providing for the removal of cases from state to federal

1 of the Ku Klux Act, from which § 1983 derives, specifically provided that federal jurisdiction under that section would be exercised "with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of . . . [April 9, 1866]; and the other remedial laws of the United States which are in their nature applicable in such cases" (*see* note 5, *supra*).

By its express terms, § 1988 would seem to function no differently than the general federal adjudicative principles discussed above; it requires federal jurisdiction to be exercised, first, "in conformity with the laws of the United States, so far as such laws are suitable to carry

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court in specified circumstances. It then contained the following language, which is now § 1988:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

The entire 1866 Act was re-enacted, following passage of the Fourteenth Amendment, by § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140. In 1874 the revisers (*see generally Runyon* v. *McCrary*, 96 S. Ct. 2586, 2593 n.8 (1976)) made § 1988 applicable to all civil rights legislation. REV.STAT. § 722. By Pub.L.No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, Congress amended § 1988 by adding the Civil Rights Attorney's Fees Awards Act of 1976, to authorize awards of attorneys' fees in civil rights cases which theretofore were not covered by statutory fee-award provisions. Congress thereby made plain its view of § 1988 as a broad remedial statute designed to further, in all ways possible, the conduct of covered civil rights litigation.

the same into effect," and, second, "where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law," resort may be had to state law "so far as the same is not inconsistent with the Constitution and laws of the United States . . . ." [37] This Court has so construed it: "the section is intended to complement the various acts which . . . create federal causes of action for the violation of federal civil rights . . . . [because] inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action." *Moor* v. *County of Alameda*, 411 U.S. 693, 702 (1973). *See also Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

As we have previously pointed out (*see* note 20, *supra*, and accompanying text), the lower federal courts have frequently relied on § 1988, in whole or in part, to justify resort to state wrongful-death and survival procedures in § 1983 litigation. We have also shown that this practice finds firm support in legal history independently of § 1988, although the statute adds an extra measure of congressional support for this consistent approach to

[37] As one commentator has observed:

> In both *Pritchard* and *Brazier*, application of state survival statutes was simply a method of implementing the courts' underlying determination that effectuation of the congressional purpose required survival of actions under the Civil Rights Act. Although this approach led to satisfactory results in these cases, since state law provided for survival, it would prove abortive in jurisdictions with more restrictive statutes. It should be recognized that once the courts, even by a tenuous inference from statutory policy, have found that Congress intended actions to survive, the ultimate question has been answered; accordingly, that determination should be given effect as a matter of federal interstitial law rather than through a theory that depends for its utility on the content of state law.

Note, *Survival of Actions Brought Under Federal Statutes*, 63 COLUM. L. REV. 290, 297 (1963) (footnotes omitted); *see also id.* at 305; *Shaw* v. *Garrison*, *supra*.

§ 1983 death cases. It is especially appropriate for the courts to search out such suitable remedial devices when a violation of civil rights results in death, because, as Mr. Justice Harlan stated in another context:

> Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death.

Moragne v. *States Marine Lines, Inc.*, *supra*, 398 U.S. at 381.

There is no room for doubt, in the light of this discussion, that there is a wrongful-death process available when appropriate in all § 1983 cases.[38] Whether the

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[38] The Colorado Supreme Court's rulings (550 P.2d at 345) that there is no § 1983 wrongful-death remedy independent of state law and that petitioner cannot sue for the deprivation of her son's constitutional rights, are thus misplaced and essentially irrelevant. For, in all events, the issue which determines liability is whether the *decedent's* constitutional rights were violated. This same inquiry—whether there has been a breach of a legal duty owed to the decedent—is the dispositive one in nonconstitutional wrongful-death actions as well. Wrongful-death cases are unique in this respect, but that is merely reflective of the fact that death itself is an injury without equal. *Cf. Woodson* v. *North Carolina*, 96 S. Ct. 2978, 2992 (1976).

Some of the lower federal courts appear to have been troubled on occasion by the rule of *Bailey* v. *Patterson*, 369 U.S. 31 (1962), that one person may not sue for the deprivation of another's constitutional rights. But that concern is inapplicable to wrongful-death and survival actions under § 1983. *See, e.g., Smith* v. *Wickline*, 396 F.Supp. 555, 557 (W.D. Okla. 1975). The *Bailey* rule is one designed to insure the presence of an Art. III "case or controversy." There can be no question, in cases such as this one, that a "case or controversy" is extant. Wrongful-death cases are among the most traditional forms of litigation, and it has never been suggested, in the numerous survival and wrongful-death cases that have appeared before this Court, that the Court was without constitutional power to decide these common-place disputes.

§ 1983 death action relies on state legislation or is created through the application of general federal remedial principles, it is in all respects a *federal* cause of action.

We turn now to the issue relating to the proper measure of relief in § 1983 wrongful-death cases.

III. Restrictive State Damage Rules, Such As Colorado's "Net Pecuniary Loss" Limitation, Are Inapplicable When Incompatible With Interests Protected By § 1983.

The Colorado Supreme Court determined, in effect, that $1,500 was the proper measure of relief in a § 1983 action alleging that state officers killed petitioner's son in contravention of the Fourteenth Amendment. It is inconceivable to *amici* that such an unconscionable result can coexist with § 1983—unless the humane remedial purposes of that statute, which we have detailed previously, are to be negated. Consideration of those purposes is the starting point in determining the remedial scope of § 1983; because, as Mr. Justice Harlan observed in *Monroe* v. *Pape*, *supra*, 365 U.S. at 196 n. 5.:

> It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

Consequently, "[s]tandards governing the granting of relief under § 1983 are to be developed by the federal [and state] courts in accordance with the purposes of the statute and as a matter of federal common law." *Adickes* v. *S.H. Kress & Co.*, *supra*, 398 U.S. at 231 (separate opinion of Brennan, J.).

A. *Complete Justice And Deterrence of Unconstitutional Conduct Are The Twin Goals of § 1983.*

From the beginning, it has been the goal of American justice to ensure "the right of every individual to claim

the protection of the laws, whenever he receives an injury . . ."; to ensure that "the laws furnish . . . [a] remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 1 Cranch (U.S.) 137, 163 (1803) (Marshall, C.J.). Or, in Justice Cardozo's words: "Once let it be ascertained that the amount is determinable, and all that follows is an incident. . . . [O]nce a wrong is brought to light [, t]here can be no stopping after that until justice is done." *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28, 35-36 (1933). "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969). This is the basic compensatory thesis of American justice: "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury," *Wicker* v. *Hoppock*, 6 Wall. (U.S.) 94, 98 (1867), only recently reaffirmed in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-19 (1975).

This central theme of complete justice is certainly the minimum remedial standard of § 1983. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 231-32 (1970) (Brennan, J., concurring in part and dissenting in part). But, as we have mentioned previously, and as the Ku Klux debates make clear, there is also a deterrence purpose underlying § 1983. A recurring theme in the 1871 debates was that a few substantial civil judgments and a few criminal convictions in each state would significantly advance the effort to bring to an end the lawless activities of the Ku Klux organizations. This Court has given effect to a similar purpose reflected in other civil rights

legislation, *cf. Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-18, and it is obvious that such a purpose is even more predominant in § 1983. This means, as the lower courts have long recognized,[39] that punitive damages are recoverable in appropriate circumstances. *See* Justice Brennan's separate opinion in *Adickes*, *supra*.

B. *The "Net Pecuniary Loss" Rule Negates The Purposes of § 1983.*

This case presents a particularly aggravated example of a limitation upon recovery for violation of federal constitutional rights which is in no way related to the purposes of § 1983 summarized above. The Colorado "net pecuniary loss" rule was applied to this case only by virtue of the Colorado Supreme Court's mistaken conclusion that its wrongful-death statute was identical to § 1983 ("adequacy in a death case of the state remedies to vindicate a civil rights violation," 550 P.2d at 345), and its misconstruction of 42 U.S.C. § 1988 (which we discuss in the following subsection).[40] Nowhere in its opinion did the court below attempt to justify the restriction upon petitioner's right to recover damages for the unlawful killing of her son by reference to the compensatory or deterrent purposes which underlie the Ku Klux Act. No such justification consistent with the Act can be formulated.

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[39] *See, e.g., Spence* v. *Staras*, 507 F.2d 554 (7th Cir. 1974); *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965). The United States District Court for the District of Colorado has recognized the appropriateness of punitive damages in cases alleging violations of § 1983. *Rhoads* v. *Horvat*, 270 F.Supp. 307 (D. Colo. 1967).

[40] In essence, the Colorado Supreme Court treated this action like a Federal Tort Claims Act case rather than a § 1983 case. *See Bartch* v. *United States*, 330 F.2d 466 (10th Cir. 1964).

The Colorado "net pecuniary loss" rule evidently reflects state policy with respect to the conditions under which the common law rule of abatement should be modified to promote adjustment of the burden of loss caused by negligence and other tortious activities. *See* note 31, *supra*. That limitation was clearly not designed to further the protection of federal constitutional interests. And, as is apparent from the unfortunate circumstances of this case, its application to § 1983 actions simply perpetrates injustice.

This Court has recently held that the "net pecuniary loss" rule is an unacceptable measure of damages in *Moragne*-type wrongful-death cases. *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974). If such restrictions on the complete-justice principle are inappropriate in admiralty, *a fortiori* they are unacceptable here. *See* Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DEN. L.J. 480, 489 (1966). Unquestionably, a person who is seriously injured by a police officer acting contrary to the Fourteenth Amendment would be able to recover damages many times greater than $1,500. But under the rule announced below, only token damages are recoverable when death results. Police officers are thus encouraged to kill (*cf.* note 24, *supra*). We do not see how a rule of damages which rewards police officers for killing citizens rather than just maiming them can survive side by side with the Fourteenth Amendment.

The scope of the damages remedy in § 1983 wrongful-death cases is to be worked out on a case-by-case basis, and all of the elements of recovery need not be decided in the instant case. Of course, the Court should hold that petitioner is at least entitled to recover for the elements of loss listed in *Sea-Land Services*, *supra*, and, for the reasons discussed in the preceding subsection, punitive damages should the facts warrant. *See Spence* v.

Staras, 507 F.2d 554 (7th Cir. 1974); *cf.* note 39, *supra*. Petitioner is plainly entitled to a measure of relief co-extensive with the constitutional injury and the federal policies to be served by § 1983—unless the law mandates the application of restrictive state rules, which we now discuss.

C. *Uniform Federal Rules of Recovery Are Required Even Where State Wrongful-Death Statutes Are Utilized.*

At the outset of this section of Argument we cited Mr. Justice Brennan's separate opinion in *Adickes* v. *S. H. Kress & Co.*, *supra*, for the proposition that uniform federal damages principles must be applied in § 1983 cases. As the Court of Appeals for the Third Circuit stated in the course of a well-considered opinion on the subject in *Basista* v. *Weir*, 340 F.2d 74, 86 (3d Cir. 1965) (footnote omitted):

> The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.

And as further stated by Mr. Justice Brennan in *Adickes*, *supra*, § 1983 "relief should not depend on the vagaries of the general common law but should be governed by uniform and effective federal standards."

398 U.S. at 232. These principles are especially relevant in the context of wrongful-death and survival statute, the protean nature of which is described in W. PROSSER, LAW OF TORTS §§ 126-27 (4th ed. 1971). Suffice it to say here that the statutes and judicial interpretations of the several states result in a crazy-quilt of rules relating to recoverable damages.

In contexts no less compelling than those present here, the Court has fashioned uniform rules affecting the relief available under § 1983. The Court has done this in all of its absolute and qualified-immunity decisions from *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), through *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). *See generally* Theis, *Shaw* v. *Garrison: Some Observations On 42 U.S.C. § 1988 And Federal Common Law*, 36 LA. L. REV. 681, 685 (1976). There is, therefore, no reason deriving from general principles of federal law why § 1983 relief should be circumscribed by state principles of damages designed primarily to deal with entirely different policies and interests.

Furthermore, there is plainly nothing in 42 U.S.C. § 1988 that prescribes the use of inhospitable state remedial rules in § 1983 cases.[41] In Argument IIB, *supra*, we observed that the policy of § 1988 is neither more nor less than the general non-statutory federal practice of resorting to state law in aid of but not in derogation

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[41] On page 7 of their brief opposing the grant of a writ of certiorari, the respondents state that, "The Colorado Supreme Court followed the *unanimous precedent* of the federal courts in holding that the Colorado *measure of damages* for wrongful death would apply in a Civil Rights action based upon a wrongful death." (Emphasis added). With the exception of *James* v. *Murphy*, 392 F. Supp. 641 (M.D.Ala. 1975), the cases cited in text (pp. 4-7) do not support this conclusion. Nor does it follow that, just because a federal court would use § 1988 to incorporate state wrongful-death statutes, damage limitations would apply as well. *See* cases cited in Brief of Respondents, n. 1. Since virtually all of these cases arose on motions to dismiss, the damage issue was not addressed.

of federal rights and obligations.[42] This Court's authoritative construction of § 1988 is "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." *Sullivan* v. *Little Hunting Park, supra*, 396 U.S. at 240. Accordingly, § 1988 also requires the application of federal remedial rules whenever state law falters.

Finally, we think Mr. Justice Brennan's dissenting opinion in *The Tungus, supra*, which we interpret in light of *Moragne* as now being sound law,[43] is dispositive of the very point at issue here—i.e., that the process of state wrongful-death legislation may be resorted to in litigation involving the breach of federally-imposed duties, but that uniform federal standards of relief must be

[42] The Rules of Decision Act, 28 U.S.C. § 1652, has no application to this case in light of the supervening purpose of § 1983, which as we demonstrate in text "requires" a uniform federal rule of damages. *Cf. Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (subject matter "peculiarly one that calls for uniform law"); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969) ("As we read Sec. 1988 . . . both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes . . . . [T]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."). *See Moor* v. *County of Alameda, supra*, 411 U.S. at 703; *Shaw* v. *Garrison, supra*, 545 F.2d at 983-84; *Brown* v. *Ballas*, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971). *See generally*, Theis, *Shaw* v. *Garrison: Some Observations On 42 U.S.C. §1988 and Federal Common Law*, 36 LA. L. REV. 681, 684-88 (1976); Niles, *supra* n. 23, 45 TEX. L. REV. at 1023-25; Page, *supra* n. 23, 43 DENVER L.J. at 489. To hold otherwise in this case would require the overruling of a long line of decisions in which uniform federal law was enunciated in litigation affecting matters of special federal concern without any reference to or discussion of the Rules of Decision Act. *See* cases cited at pp. 48-49, *infra*.

[43] As we follow the law from *The Harrisburg*, 119 U.S. 199 (1886), through *The Tungus* to *Moragne's* overruling of *The Harrisburg*, upon which *The Tungus* relied, Justice Brennan's dissent in *The Tungus* is now the law; and it would have been the law in 1959 had not the majority in *The Tungus* felt bound by *The Harrisburg*.

applied in such cases. In particular, we note Justice Brennan's analysis (358 U.S. at 604-05) of several state court maritime wrongful-death decisions, one of which held: "[W]e must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal courts." *Riley* v. *Agwilines, Inc.*, 296 N.Y. 402, 405-06, 73 N.E. 2d 718, 719 (1947).[44] Justice Brennan's well-documented conclusion in the admiralty context is fully applicable to the circumstances of the case at bar: "While there is ground for local variation on nonessential matters, on the essentials the admiralty may look to uniform features in these statutes rather than the diverse." 358 U.S. at 609. Since the damage rules of state wrongful-death and survival statutes are "diverse" (*see, e.g., Sea-Land Services, supra*),[45] they should be subordinated to uniform federal rules which serve the broad purposes of § 1983.

[44] State courts have applied federal law in § 1983 cases and many other contexts involving violations of federal rights. *See, e.g., Dudley* v. *Bell*, 50 Mich. App. 678, 213 N.W. 2d 805 (1973); *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N.Y.2d 576, 579-85, 255 N.E.2d 774, 775-79, 307 N.Y.S.2d 660, 662-66, *cert. denied*, 398 U.S. 939 (1970); *Basham* v. *Smith*, 149 Tex. 297, 233 S.W. 2d 297, 300-302 (1946).

[45] Colorado's Death Act is generally patterned after Lord Campbell's Act. This means that a property interest is created in certain designated survivors for the "net pecuniary loss" to them resulting from his death. Colorado's survival statute permits the recovery of punitive damages and penalties resulting from injuries unless the *defendant* dies. Apparently, these are unavailable if the plaintiff dies instantly. The statute provides that damages recoverable after the plaintiff dies are limited to loss of earnings and expenses incurred prior to death. No damages are permitted for pain and suffering or disfigurement nor prospective profits or earnings after death. Neither of these statutes fulfills the purpose of the Civil Rights Act to act as a deterrent to official misconduct as well as to afford compensatory relief.

In sum, the federal cause of action in cases such as this one arises out of the deprivation of life without due process of law. The purpose served by state wrongful-death and survival statutes is to overcome the draconian common-law rule that causes of action abate upon the death of either party. Once that purpose has been accomplished, there is no reason why a federal court should be constricted by limitations on damages adopted by the state as part of its general tort law.

IV. If the State Wrongful-Death Act Must Be Applied in its Entirety, Then This Court Should Reject the State Law Approach Altogether and Create a Federal Common Law of Survival and Wrongful Death Under § 1983.

We have argued that the Court should apply a federal rule of damages in implementing the principles established by the state wrongful-death statute. However, if the Court holds that a state statute must be applied *in toto*, then *amici* believe it is incumbent upon the Court to create a federal common law of wrongful death under § 1983. The controlling principles are outlined in Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 (1975):

> Since judicial power to create federal common law admittedly exists where authorized by statute, concern usually centers upon the appropriate criteria for determining whether federal common law is to be fashioned when a congressional determination to displace state law is a possible, but not unmistakeable construction. Although the cases are somewhat ad hoc—reflecting a crazy-quilt pattern of statutory, constitutional, and pragmatic considerations—the analysis is usually framed in terms of whether the congressional purpose embodied in, or indicated by, a statute requires state law to be subordinated. Con-

> gressional purpose is divined by the normal common law techniques of looking to the words of the statute, the problem it was meant to solve, the legislative history, the structure of the statute, its place among other federal statutes, and the need for a uniform national rule of law. Where the inquiry indicates that application of state law would frustrate congressional policy, state law is subordinated. This is the usual mode of preemption analysis. [footnotes omitted].

The necessity for federal courts to formulate remedies is founded "upon the presence of a federal interest coupled with the reasons which undermine the presumption that state law should apply." Note, *Federal Common Law*, 82 HARV. L. REV. 1512, 1525 (1969). If a court determines that the general presumption in favor of state law applies,

> It [still] must inquire whether the need exists for federal law to further federal policies or foster uniformity. If either circumstance is present, it must weigh the benefits promised by local solution against the need for a national rule.

Id. at 1531. With respect to uniformity, plainly federal law is created for the whole nation. "Hence, there is an interest in having it mean the same thing in each state." *Id.* at 1529. *See Jerome* v. *United States*, 318 U.S. 101, 104 (1959).

With respect to the furtherance of federal policy, the same reasons that led this Court in *Moragne* v. *States Marine Lines, Inc.*, *supra*, to abandon the reliance on state wrongful-death statutes in admiralty law are present in this case. As the Court pointed out in *Moragne*, the legislatures, both here and in England, began to evidence *unanimous disapproval* of the abatement of death

actions.[46] As the Court said in *Moragne* (398 U.S. at 390):

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

During the period in which the doctrine of *The Harrisburg*, *supra*, held sway, it was understood that statutes of the coastal states could be used to fill the void for death on the high seas if the state so intended. This

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[46] "Today we should be thinking of the death statutes as part of the general law." Pound, *Comment on State Death Statutes—Application to Death in Admiralty*, 13 NACCA L.J. 188, 189 (1954), quoted in *Moragne*, *supra*. *See also Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 350-51 (1936), where Mr. Justice Cardozo said:

> Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day. [Footnote omitted]

was without the benefit of any statute similar to § 1988. In any event, persons injured within the territorial limits of the states could utilize state wrongful death statutes if these statutes were interpreted to include unseaworthiness claims. That approximates the situation now with respect to death actions under § 1983.

Thus, a claim for a violation of constitutional rights may survive or abate, or result recovery for net pecuniary loss, compensatory or punitive damages, depending upon where the violation occurs. Furthermore, the present situation creates the anomaly that if a person is merely injured by official misconduct, he can bring a civil rights action and seek compensatory and punitive damages and, at the same time, maintain an action for assault and battery under state law. *See* note 23, *supra*. But if he dies, his damages under § 1983 are severely contracted by the state wrongful-death statute. This defies all logic and defies the notion of uniformity for redress of deprivations of constitutional rights. There is simply no substantial justification for the haphazard pattern which results when state laws are pressed into service to afford a remedy when a violation of constitutional rights results in death. In every other kind of constitutional injury, the federal courts presently apply a federal common law of damages. A different rule applicable where injury results in death is not sustainable.

Accordingly, the issue under discussion here is whether federal law, in its common-law dimension, has sufficient flexibility to adapt to "the result dictated by elementary principles in the law of remedies." *Moragne* v. *States Marine Lines, Inc.*, *supra*, 398 U.S. at 381. Two decades of litigation in the lower federal courts over this precise issue in § 1983 death cases has produced an affirmative answer. That answer is confirmed by numerous decisions of this Court, both in general and in analogous circumstances. Although this Court has been required

to fashion federal substantive and remedial principles less frequently since *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) than it was during the regime of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1 (1842), it has nevertheless confronted such tasks with considerable regularity.[47] With particular relevance to the instant case, Mr. Justice Harlan's opinion for a unanimous Court in *Moragne* v. *States Marine Lines, Inc., supra*, and Mr. Justice Brennan's dissenting opinion (joined by three other members of the Court) in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 597-612 (1959), stand at the head of a large class of cases, coming here from both the state courts and the lower federal courts, in which the Court has developed uniform substantive and remedial principles of federal law. *See, e.g., Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (original jurisdiction); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 338 (1971); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Farmers Educ. Cooperative Union* v. *WDAY*, 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Textile Workers Union* v. *Lincoln Mills*, 363 U.S. 448 (1957); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1945) (Frankfurter, J.); *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945) (Black, J.); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (Stone, C.J.); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943) (Douglas, J.); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) (Stone, C.J.); *Jackson County* v. *United States*, 308 U.S. 343 (1939) (Frankfurter, J.).

[47] As early as 1935 it was established that "if a claim based upon national law is asserted, whether in a state or a federal court, the federal statutes or the rules of decision of the federal courts must be looked to for a determination of the measure of damages." C. McCORMICK, HANDBOOK ON DAMAGES § 3, p. 11 (1935). While this was written when *Swift* v. *Tyson, supra*, was still the law, the existence of a federal common law in nondiversity cases is well documented. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964). See P. BATOR, P. MISHKIN, D. SHAPIRO and H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 756-832 (2d ed. 1973).

These and many other cases do not result from the fear that "the judicial hand would stiffen in mortmain if it had no part in the work of creation." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 313 (1947) (Rutledge, J.). They result, rather, from the adjudicative obligations of the federal courts with respect to matters "distinctively federal in character." *Id.* at 305. And as we have shown above, no class of cases can be more uniquely federal than § 1983-Fourteenth Amendment actions. *See also Adickes* v. *S. H. Kress & Co., supra*, 398 U.S. at 231-34 (Brennan, J., concurring in part and dissenting in part). The power and the authority exist for this Court to fashion a § 1983 wrongful-death remedy without regard to other state or federal legislation; the foregoing cases establish the propriety and, indeed, the obligation.

The exercise of that power in this case is required both by the interest in achieving uniformity in the redress of federally created rights and by the substantial interest in seeing that those rights are *effectively* redressed.

CONCLUSION

For the foregoing reasons, *amici* submit that the judgment below should be reversed and the case remanded for trial of petitioner's § 1983 claims in accordance with federal remedial principles responsive to the federal policies and interests at stake.

Respectfully submitted,

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